Datuk Bandar Kuching Utara v Kuching Plaza Sdn Bhd & Ors

HIGH COURT (KUCHING) — CIVIL SUIT NO 22–243 OF 1998–III (I)
DAVID WONG JC
29 JANUARY 2007

Local Government — Rates — Arrears of assessment — Liability to pay rates and fees on unpaid rates — Beneficial owners — Whether complied with statutory provision on imposition of fees for unpaid rates — Whether claim against the second, third, fourth and fifth defendants in representative capacity competent without service of writ of summons on second defendant — Whether rates and fees levied validly assessed — Whether plaintiff by subsequent conduct abandoned and/or waived their claim on unpaid rates and fees levied on unpaid rates — Kuching Municipal Ordinance of Sarawak (Cap 116)

Limitation — Rates by local government — Whether Limitation Ordinance of Sarawak (Cap 49) applicable

The plaintiff is a corporation established under the City of Kuching North Ordinance 1988 and is empowered to collect rates due by property owners. The plaintiff prior to 1 January 1998 was governed by the Kuching Municipal Ordinance (Cap 116) ('KMO') and later the Local Authorities Ordinance 1996 (Cap 20) ('LOA') which repealed and superseded the KMO. The first defendant was and still is the registered proprietor of all that parcel of land situated at McDougall Road, Kuching, Sarawak and described as Lot 16 Section 30 Kuching Town Land District and had built and erected on the said land, building and appurtenances thereon known as 'Kuching Plaza'. The first defendant had sub-divided the completed space in Kuching Plaza into 155 sub-lots and had sold various sublots in Kuching Plaza to various purchasers. The second, third, fourth and fifth defendants were some of the purchasers of the various sublots in Kuching Plaza. The first defendant still owned the unsold sublots. The plaintiff issued assessment bills in respect of the first defendant's own sublots in the name of the first defendant for the period from the second half of year 1989 to the first half of the year 1998. The plaintiff issued assessment bills in respect of the sublots sold by the first defendant to the purchasers in the joint names of the first defendant and the purchasers for the period from the second half of year 1989 to the first half of year 1998. The plaintiff wrote to the purchasers of the various sublots informing them that their sublots had been updated based on the sale and purchase agreements submitted by the Kuching Plaza's Management Office, and drew their attention to the outstanding assessment rates for period from second half 1989 to first half 2005 ('outstanding assessment rates') that had to be paid. On 31 July 2005, the plaintiff,

by demand notices to the first defendant and the purchasers demanded from outstanding assessment rates.

Held:

(1) It would be 'plainly unconscionable' to allow the third, fourth and fifth defendants and the purchasers they represent to enjoy the full benefits of ownership of the various sublots without having to pay the rates and fees. The fact that the fourth defendant and some purchasers had settled the rates and fees for their sublots showed that the purchasers were aware and had accepted the fact that they were liable to pay the rates and fees once they become beneficial owners of their lots. Accordingly, the third, fourth and fifth on behalf of themselves and the rest of the purchasers of the various sublots in Kuching Plaza were liable to pay the rates and fees issued by the plaintiff on their own sublots (see paras 29–30) *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 3 MLJ 163 followed.

(2) Item 101 of the Sarawak Limitation Ordinance does not apply to this case. Item 101 only applies when the plaintiff applies to the court for the sale of the property to recover the unpaid rates and fees. What the plaintiff had done was by way of a normal civil action to recover the unpaid rates and fees from individual purchasers. The word 'enforce' was used to specifically refer to an exercise of the rights of a first chargee (see paras 34, 36 & 38).

(3) The KMO does not require the plaintiff to gazette the imposition of fees because that was not required for the assessment of the rates. In any event, fees on unpaid rates cannot be regarded as the same as rates. Further, the defendants in challenging the imposition of fees must prove to the court that the amount was an unreasonable one and was imposed in bad faith. There was no such proof before the court (see paras 43–44).

(4) Even though the plaintiff may have decided to impose fees on unpaid rates, they still have to claim for it by notifying the defendants. One way of such notice is by way of endorsement on the assessment bills. In the present case the plaintiff had made such endorsement on some assessment bills. Not all assessment bills contained such endorsement. Such proper notices must be given to the owners before the plaintiff can claim for the same (see paras 46–48).

(5) The claim against the second, third, fourth and fifth defendants, in their representative capacity, pursuant to the court order dated 27 April 2000 ('order'), was competent as against the third, fourth and fifth defendants without the service by the plaintiff of the writ of summons on the second defendant. There was no provision in the Order that all the then intended defendants must be served. Neither were they made as joint representatives for the purchasers. Further there was no prejudice to the third, fourth and fifth defendants as the representative action affects the purchasers which they represent (see para 49).

(6) The rates and fees levied for outstanding rates claimed against the third, fourth and fifth defendants had been validly assessed and levied under the KMO and/or LOA. The plaintiff had complied with the statutory provisions in assessing and levying the rates. The duty lies with the first defendant to inform the purchasers whenever there is assessment and review of rates as long as the records of the plaintiff in respect of ownership of the sublots had not been changed (see paras 50 & 52).

(7) The plaintiff had not by conduct subsequent to the filing of this action, abandoned and/or waived their claim in this action on the rates and fees levied for outstanding rates as against the first, third, fourth and fifth defendants in both their personal and representative capacity. What the plaintiff did was to send fresh notices to individual purchasers after their records had been updated by the Kuching Plaza's Management Office. Those notices included outstanding assessment rates. This could not amount to conduct of waiver of the claims (see para 53).

[Bahasa Malaysia summary

Plaintif adalah sebuah syarikat yang diperbadankan di bawah Ordinan Bandar Kuching Utara 1988 dan diberi kuasa untuk mengutip kadaran yang tertunggak oleh pemilik hartanah. Plaintif, sebelum 1 Januari 1998 adalah ditadbir oleh Ordinan Perbandaran Kuching (Cap 116) ('KMO') dan kemudiannya Ordinan Pihak Berkuasa Tempatan 1996 (Cap 20) ('LOA') yang mana memansuhkan dan menggantikan KMO. Defendan pertama adalah dan masih lagi sebagai tuan punya berdaftar ke atas semua bidang tanah yang terletak di McDougall Road, Kuching, Sarawak dan dinyatakan sebagai Lot 16 Seksyen 30, Kuching Town Land District dan telah dibina dan didirikan di atas tanah tersebut, bangunan dan kelengkapan di atasnya yang dikenali sebagai 'Kuching Plaza'. Defendan pertama telah memecahbahagikan kawasan yang telah siap di dalam Kuching Plaza kepada 155 sublot dan telah menjual pelbagai sublot di dalam Kuching Plaza kepada pelbagai pembeli. Defendan kedua, ketiga, keempat dan kelima adalah sebahagian daripada pembeli-pembeli sublot di dalam Kuching Plaza. Defendan pertama masih lagi memiliki sublot-sublot yang tidak terjual. Plaintif telah mengeluarkan bil-bil taksiran berkenaan dengan sublot-sublot milikan defendan pertama menggunakan nama defendan pertama untuk tempoh daripada pertengahan tahun kedua 1989 sehingga pertengahan tahun pertama 1998. Plaintif mengeluarkan bil-bil taksiran berkenaan dengan sublot-sublot yang telah dijual oleh defendan pertama kepada pembeli-pembeli dalam nama bersama defendan pertama dan pembeli-pembeli untuk tempoh daripada pertengahan tahun kedua 1989 hingga pertengahan pertama tahun 1998. Plaintif telah menulis kepada pembeli-pembeli pelbagai sublot-sublot memberitahu mereka bahawa sublot mereka telah dikemaskini berdasarkan kepada perjanjian jual beli yang telah dihantar oleh oleh Pejabat Pengurusan Kuching Plaza, dan menarik perhatian mereka kepada kadar taksiran yang tertunggak untuk tompoh daripada pertengahan kedua 1989 hingga pertengahan pertama 2005 ('kadar taksiran tertunggak') yang perlu dibayar. Pada 31 Julai 2005, plaintif melalui notis tuntutan

kepada defendan pertama dan pembeli-pembeli menuntut daripada mereka kadar taksiran yang tertunggak.

Diputuskan:

(1) Ianya adalah satu yang 'tidak berhati perut yang jelas' untuk membenarkan defendan ketiga, keempat dan kelima dan pembeli-pembeli yang mereka wakili untuk menikmati faedah yang penuh hakmilik ke atas pelbagai sublot tanpa membayar kadaran dan yuran. Keadaan di mana defendan keempat dan sebahagian pembeli telah menyelesaikan kadaran dan yuran untuk sublot mereka menunjukkan bahawa pembeli-pembeli adalah menyedari dan menerima keadaan bahawa mereka adalah bertanggungan untuk membayar kadaran dan yuran apabila mereka menjadi pemilik benefisial lot mereka. Sewajarnya, defendan ketiga, keempat dan kelima bagi pihak diri mereka dan pembeli-pembeli pelbagai sublot yang lain di dalam Kuching Plaza adalah bertanggungan untuk membayar kadaran dan yuran yang dikeluarkan oleh plaintif ke atas sublot mereka (lihat perenggan 29–30); *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 3 MLJ 163 diikut.

(2) Perkara 101 Ordinan Had Masa Sarawak tidak terpakai kepada kes ini. Perkara 101 hanya terpakai apabila plaintif memohon kepada mahkamah untuk penjualan hartanah untuk mendapatkan semula kadaran dan yuran yang tidak dibayar. Apa yang telah dibuat oleh plaintif adalah melalui tindakan sivil yang normal untuk mendapatkan semula kadaran dan yuran yang tidak dibayar daripada pembeli-pembeli perseorangan. Perkataan 'kuatkuasa' digunakan untuk merujuk secara spesifik kepada penggunaan hak pemegang gadaian pertama (lihat peranggan 34, 36 & 38).

(3) KMO tidak memerlukan plaintif untuk mewartakan pengenaan yuran kerana ianya tidak diperlukan untuk kadar taksiran. Dalam apa jua keadaan, yuran ke atas kadaran yang tidak dibayar tidak boleh dianggap sebagai sama dengan kadaran. Selanjutnya, defendan-defendan dalam mencabar pengenaan yuran mestilah membuktikan kepada mahkamah bahawa jumlah yang dikenakan adalah satu yang tidak munasabah dan dikenakan dengan niat buruk. Tidak terdapatnya bukti sedemikan di hadapan mahkamah (lihat perenggan 43–44).

(4) Walaupun plaintif mengambil keputusan untuk mengenakan yuran ke atas kadaran yang belum dibayar, mereka masih perlu untuk menuntut untuknya dengan memberitahu defendan-defendan. Satu cara pemberitahuan tersebut adalah secara pengindorsan di atas bil-bil taksiran. Dalam kes ini, plaintif telah membuat pengindorsan tersebut di atas sebahagian bil-bil taksiran. Tidak semua bil-bil taksiran mengandungi pengindorsan. Notis yang sebetulnya mestilah diberikan kepada pemilik sebelum plaintif boleh menuntut ke atasnya (lihat perenggan 46–48).

(5) Tuntutan terhadap defendan kedua, ketiga, keempat dan kelima, di dalam kapasiti perwakilan mereka, menurut perintah mahkamah yang bertarikh 27 April 2000 ('perintah'), adalah kompeten terhadap defendan ketiga, keempat dan kelima tanpa penyampaian oleh plaintif writ saman ke atas

defendan kedua. Tidak terdapatnya peruntukan di dalam perintah bahawa kesemua defendan yang dimaksudkan mesti disampaikan. Begitu juga mereka dijadikan sebagai perwakilan bersama bagi pembeli-pembeli. Selanjutnya, tidak terdapatnya prejudis terhadap defendan ketiga, keempat dan kelima berkenaan dengan tindakan perwakilan menjejaskan pembeli-pembeli yang mereka wakili (lihat perenggan 49).

(6) Kadaran dan yuran yang dikenakan untuk kadaran tertunggak yang dituntut terhadap defendan ketiga, keempat dan kelima adalah secara sah ditaksirkan dan dikenakan di bawah KMO dan/atau LOA. Plaintif telah memenuhi peruntukan statutori dalam menaksirkan dan mengenakan kadaran. Tanggungjawab terletak kepada defendan pertama untuk memberitahu pembeli-pembeli apbila terdapatnya taksiran dan semakan semula kadaran selagi mana rekod plaintif berkenaan dengan pemilikan sublot-sublot tidak bertukar (lihat perenggan 50 & 52).

(7) Plaintif adalah tidak melalui tindakan berlanjutan daripada pemfailan tindakan ini, mengabaikan dan/atau mengenepikan tuntutan mereka ke atas kadaran dan yuran untuk kadar tunggakan terhadap defenden pertama, ketiga, keempat dan kelima di dalam kedua-dua kapasiti perseorangan dan perwakilan. Apa yang telah dibuat oleh plaintif, menghantar notis yang baru kepada pembeli perseorangan selepad rekod mereka dikemaskini oleh Pejabat Pengurusan Kuching Plaza. Notis termasuk kadar taksiran yang tertunggak. Ini tidak menjadikan tindakan mengenepikan tuntutan (lihat perenggan 53).]

Notes

For cases on arrears of assessment, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 144–146.

For cases on limitation generally, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2070–2390.

Cases referred to

Barnes v Jarvis [1953] 1 WLR 649 (refd)

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12 (refd)

Generation Product Sdn Bhd v Majlis Perbandaran Klang [1997] MLJU 147 (refd)

Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal [1991] 3 MLJ 163 (folld)

Majlis Perbandaran Klang v Generation Product Sdn Bhd [2006] 4 MLJ 635 (refd)

Sutton v Sutton 22 Ch D 511 (refd)

Legislation referred to

City of Kuching North Ordinance 1988
Indian Ordinance 1908
Kuching Municipal Ordinance ss 2, 64, 72
Limitation Act [India]
Local Authorities Ordinance 1996 s 154(1)
Real Limitation Act 1874 [UK]
Sarawak Land Code s 148(2)(c)
Sarawak Limitation Ordinance items 97, 101

A Sarawak Strata Titles Ordinance 1974
Strata Titles Ordinance 1995

Chan Kay Poh (Chan Choon Lin with him) (Chan & Chan Advocates) for the plaintiff.
Kilat Beriak (Christine Loh with him) for the first defendant.
Satindir Singh Sandhu for the third, fourth and fifth defendants.

B

David Wong JC:

INTRODUCTION

C

[1] When this matter was case managed by this court, I asked counsels whether or not it can be tried without the calling of oral evidences. After several consultation sessions among counsels, they informed me that they had agreed that the trial of this suit can be done in the following manner:

D

(a) based on the agreed issues, facts and the bundle of documents prepared and submitted by the parties;

(b) without oral evidences; and

(c) based on written and oral submissions.

E

[2] Pursuant to that agreement, counsels tendered their respective submissions (all together nine in numbers, the last three tendered on the 5 January 2007) and oral clarification of counsels' respective submissions was made on 30 November 2006 and 5 January 2007.

F

[3] Mr Chan Kay Poh '(Mr Chan') appeared for the plaintiff, with Mr Kilat Beriak ('Mr Kilat') acting for the first defendant and Mr Satindir Singh Sandhu ('Mr Sandhu') appearing for the third, fourth, and fifth defendants who also represented all the purchasers of the various lots in Kuching Plaza by an order of the court dated 27 April 2000.

G

AGREED FACTS

[4] The agreed facts as contained in encl 373 and 398 are in summary form these. The plaintiff is a corporation established under the City of Kuching North
H Ordinance 1988 (Ordinance No 3 of 1988) and is empowered to collect rates due by property owners. The plaintiff prior to 1 January 1998 was governed by the Kuching Municipal Ordinance (Cap 116) ('KMO') and later from 1 January 1998 was and is governed by the Local Authorities Ordinance 1996 (Chapter 20) ('LAO') which repealed and superseded the Kuching Municipal Ordinance (Cap 116)(KMO).

I

[5] The first defendant, Kuching Plaza Sdn Bhd, was and still is the registered proprietor of all that parcel of land situate at McDougall Road, Kuching, Sarawak and described as Lot 16 Section 30 Kuching Town Land District ('the said land') and has built and erected on the said land building and appurtenances thereon known as 'Kuching Plaza'.

[6] The Kuching Plaza was a development under the provisions of the Sarawak Strata Titles Ordinance 1974 and all agreements for the sale and purchase of the various sublots were subject to the provisions of the Sarawak Strata Titles Ordinance, 1974, which has been repealed and replaced by the Strata Titles Ordinance 1995 (Chapter 18). Until now no subsidiary strata titles have been issued for the sublots in the Kuching Plaza despite the fact application had been made to the Land and Surveys Department quite sometime ago for the issuance of the subsidiary strata titles of the sublots.

[7] The first defendant had sub-divided the completed space in Kuching Plaza into 155 sub-lots in accordance with the Approved Plan No MO 248/1972 and had during the period from 1979 to 1983, sold various sublots in the Kuching Plaza to various purchasers listed in Schedule I (see encl 404). All purchasers listed in Schedule I had paid the purchase prices of the sublots in full to the first defendant and in sole and exclusive possession and occupation of the sublots. The second, third, fourth and fifth defendants are some of the purchasers of the various sublots in the Kuching Plaza. The first defendant still owns the unsold sublots.

[8] The plaintiff issued assessment bills in respect of the first defendant's own sublots in the name of the first defendant for the period from the second half of year 1989 to the first half of the year 1998.

[9] The plaintiff issued assessment bills in respect of the sublots sold by the first defendant to the purchasers in the joint names of the first defendant and the purchasers for the period from the second half of year 1989 to the first half of year 1998.

[10] On or about 13 June 2005, the plaintiff wrote to the purchasers of the various sublots informing them that their sublots have been updated based on the sale and purchase agreements submitted by the Kuching Plaza Management Office, and drawing their attention to the outstanding assessment rates (rates) for period from second half 1989 to first half 2005 that had to be paid before 30 June 2005.

[11] On 31 July 2005, the plaintiff, by demand notices to the first defendant and the purchasers demanded from them outstanding rates for the period from the second half of year 1989 to the first half of year 1998 and for fees for the period from the first half of year 1992 and subsequently thereafter.

[12] The third defendant is the beneficial owner of sublots 407 and 408 in the Kuching Plaza under and by virtue of two sale and purchase agreements between the first defendant and himself both dated 16 June 1983.

[13] The fourth defendant is the beneficial owner of sublot 339 in the Kuching Plaza under and by virtue of sale and purchase agreement between the first defendant and herself dated 2 September 1981 and had by 30 March 1993, paid in full the rates inclusive of default fees for the period from the second half year 1989 to the first half year 1998 pertaining to her own sublot 339. As such, the plaintiff is not asking for

any order against the fourth defendant in her personal capacity. Some purchasers listed in Schedule I had also paid their rates and default fees.

[14] The fifth defendant is the beneficial owner of sublots 411 and 412 in the Kuching Plaza under and by virtue of two sale and purchase agreements between the first defendant and himself both dated 16 June 1983.

[15] All the assessment bills of the plaintiff on sublots 407, 408, 411 and 412 before the year 2004 were issued in the sole name of the first defendant. They were addressed and dispatched by the plaintiff to the then registered office of the first defendant.

[16] From the year 2004 onwards, all the assessment bills on sublots 407, 408, 411 and 412 have been issued in the joint names of the third or fifth defendant (as purchasers) and the first defendant. They have been addressed and dispatched by the plaintiff to the postal address of the third or fifth defendant.

[17] The plaintiff has not served the writ of summons on the second defendant. On 25 June 2005, 12 July 2005 and 31 July 2005, the plaintiff, by demand notices to the third and fifth defendants demanded from them directly for the first time outstanding rates and fees, including those claimed in para 8(a)–(j) and para 9(a)–(g) of the re-re-amended statement of claim.

AGREED ISSUES

[18] Counsels have given me two sets of agreed issues (encls 374 and 397), which I have summarized into six issues (encl 418) and on the 5 January 2007 I extended to counsels copies of encl 418 for their approval. After perusal, counsels confirmed to me that those are the only issues which need to be addressed. These six issues are as follows:

Who is liable to pay the rates and fees imposed by the plaintiff?

[19] From the outset, it should be stated that Mr Chan has in his submission (encl 404) informed the court that the plaintiff's claim will be only for unpaid rates and fees up to first half 1998 despite what is stated in the re-re-amended statement of claim.

[20] Also, Mr Kilat at the beginning of the hearing from the bar conceded that the first defendant is liable and willing to pay the rates of the sublots which they own but for the rates of sublots not owned by them, he submitted that the liability to pay rests with the defendants as purchasers who had paid the full purchase price and been and are in exclusive possession of the various sublots of the Kuching Plaza.

[21] For Mr Sandhu, he contended that the liability rests with the first defendant as they are still the registered proprietors irrespective or not whether the third, fourth and fifth defendants and the purchasers they represent are the beneficial owners of the

various sublots. Here it is not disputed by counsels that the third, fourth and fifth defendants and the purchasers they represent are the beneficial owners of the various sublots and the first defendant is only a bare trustee for them (see *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12).

[22] Mr Sandhu's contention is based on the following sections of KMO:

> Section 64:
>
> 64(1) Every owner of rateable property within the meaning of this Ordinance, which is not excepted from payment of rates under s 54, shall pay such annual rates thereon as the council may, with the approval of the Yang Dipertua Negeri in Council, prescribe by notification in the gazette and for the purpose of imposing such rates the council may by notification signified in the gazette divide the area of the City of Kuching North.

Section 2 KMO defines:

> Owner:
>
> (a) in relation to any land or building, means the registered proprietor of the land as defined in the Land Code and, if in the opinion of the council the registered proprietor of the land cannot be traced, the person for the time being receiving the rent of the premises in connection with which the word is used whether on his own account or as agent or trustee for any other person or as receiver or who would receive the same if such premises were let to a tenant; and
>
> (b) in the case of a subdivided buildings, includes the management corporation and any subsidiary proprietor: the expressions 'management corporation' and 'subsidiary proprietor' shall have the meanings assigned to them in the Strata Titles Ordinance 1974.

[23] In interpreting any statute, the general rule is to look at the words used to determine the intentions of parliament. One must also look at the context in which the words are used and above all use common sense. Lord Goddard CJ in *Barnes v Jarvis* [1953] 1 WLR 649 aptly said:

> A certain amount of common sense must be applied in construing statutes.

[24] Here I must look at the Sarawak Land Code and determine whether the words 'registered owners' include equitable beneficial owners. In the case of *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd. and another appeal* [1991] 3 MLJ 163, the Supreme Court recognized the concept of equitable beneficial ownership in the Sarawak Land Code. The facts as reported were these: The first appellant borrowed RM5m from the respondent, BBMB, in 1979 to build Kuching Plaza (the Plaza) on certain land (the said land). The loan was secured by way of first legal charge over the said land. Under the registered charge, the redemption of title was fixed at RM40,000 per shop lot calculated on the basis of RM5m divided by 128 shop lots to be sold by the first appellant. Another important stipulation was that in the absence of strata titles to the shop lots, a request for release of loans to individual purchasers would be construed as a request for the discharge of title and the redemption of RM40,000 per title would apply.

A **[25]** The Land Office was authorized to only issue strata titles upon completion of all three phases of the plaza. From 1979 to 1985, 122 lots in the shopping centre of the plaza were sold to various purchasers, including the second to fifth appellants. The second appellant purchased two shoplots and obtained a loan from BCSB which released the redemption sum of RM80,000 direct to BBMB which in turn issued a letter of undertaking that the strata titles for the two lots would be released to BCSB. The third, fourth and fifth appellants together purchased a shop lot and obtained a loan from BBMB which released a redemption sum of RM40,000 for the discharge of the shop lot from the main charge. The full purchase price was later paid by these purchasers.

C **[26]** In 1987, BBMB demanded from the first appellant approximately RM1.5m as unpaid monies. As a result of KP's failure to reply, BBMB obtained, under s 148(2)(c) of the Sarawak Land Code an order for sale of the said land inclusive of the shop lots already sold to the second to fifth appellants.

D **[27]** The appellants' appeal against the order for sale was dismissed; hence this appeal to the Supreme Court, the contention being that BBMB, by its own stipulation and conduct, had looked to the purchasers to redeem the property charged and that it was not just in the circumstances for an order for sale to issue. BBMB raised the doctrine of indefeasibility of a registered charge as a defence.

E **[28]** The Supreme Court held that the doctrine of indefeasibility cannot apply in the circumstances even though the charge was registered in the name of Kuching Plaza Sdn Bhd as chargor. The rationale is simple and it is that the purchasers of the various sublots had paid the full purchase price and with it the redemption amount to the respondent/chargor and to allow them to foreclose would be plainly unconscionable.

[29] Though the facts there are not the same as the case before me, I am of the view that the underlying principle can be applied. If I were to uphold Mr Sandhu's submission, it would be grossly unfair to the first defendant. In fact to borrow the G words of the Supreme Court, it would be 'plainly unconscionable' to allow the third, fourth and fifth defendants and the purchasers they represent to enjoy the full benefits of ownership of the various sublots without having to pay the rates and fees. The fact that the fourth defendant and some purchasers had settled the rates and fees for their sublots shows that the purchasers were aware and had accepted the fact that they are liable to pay the rates and fees once they became beneficial owners of their H lots.

[30] Accordingly I hold that the third, fourth and fifth on behalf of themselves and the rest of the purchasers of the various sublots in Kuching Plaza are liable to pay the rates and fees issued by the plaintiff on their own sublots.

I **[31]** Before I deal with the next issue, if I may make some observations on the fact that the strata title deeds to each sublot had not been issued by the relevant authority. This is one of those cases where as a result of the just mentioned omission by the relevant authority, three groups of people suffer. Firstly, the purchasers who had paid

the purchase price (and also presumably the premium amount for the issuance of strata title deeds and the stamp duty for the transfers of the title deeds) are being deprived of their title deeds. Secondly, the Sarawak State government is presently deprived of the premium payable for the issuance of the strata title deeds. Thirdly, the Federal Government is also being deprived of the stamp duty payable on the transfer of the strata title deeds from the first defendant to the purchasers. Furthermore, if the strata title deeds had been issued promptly, there would not be any necessity for this case and *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal* as both cases required the courts to interpret the words 'registered owner' in the context of the Sarawak Land Code. So much cost to the parties and judicial time would have been saved.

Which part of the plaintiff's claims is affected by Sarawak Limitation Ordinance (Cap 49)?

[32] It was submitted by the Mr Chan that item 101 of the Schedule of the Sarawak Limitation Ordinance (Cap 49) is the applicable item in this case. Item 101 reads as:

> 101. To enforce payment of money charged upon immovable property.
>
> … 12 years …
>
> When the money sued for becomes due.

[33] The rationale for the applicability of item 101, as contended by Mr Chan, is that the unpaid rates and fees are a 'first charge' on the properties as provided in s 72 of KMO.

[34] Both Mr Kilat and Mr Sandhu submitted that Mr Chan's submission is flawed and relied on the Indian Commentaries of item 102 of the Schedule of the Indian Ordinance 1908 which is in pari materia with item 101 of the Sarawak Limitation Ordinance. Both counsels submitted that item 101 only applies when the plaintiff applies to the court for the sale of the property to recover the unpaid rates and fees. What the plaintiff had done was by way of a normal civil action to recover the unpaid rates and fees from individual purchasers. Mr Sandhu quoted from *Rustomji's The Law of Limitation and Adverse Possession*, by SP Sen Gupta (8th Ed) at p 980:

> … When under a local Municipal Act, sums due on account of house-tax, water-tax, or property-tax, are declared to be a first charge upon the buildings or lands with reference to which the tax is imposed, a suit by the Municipality to recover arrears of such taxes by sale of the buildings or lands concerned comes within the 12 years' rule in art 62, unless a different period of limitation is prescribed by the local Act …

and at p 981:

> 12. Remedy against mortgaged property: Personal relief — Article 62 is restricted to cases in which payment is sought to be enforced out of the immovable property on which it is charged or mortgaged. If the remedy for a personal decree against the defendant is barred

owing to the plaintiff's delay, he cannot extend the period of limitation by asking for an enlarged relief by way of a charge upon the defendant's property. Article 62 refers to a suit for money charged on immovable property to raise it (eg, by sale) out of that property, or out of what is a substitute for that property. Article 62 does not apply to every remedy which the instrument carries with it. Thus, it does not give 12 years for the personal remedy against the mortgagor as well as against the mortgaged property. The claim for a personal decree is governed by a different Article and not by art 62. So, a suit (based on the mortgage) for personal relief against the mortgagor is subject to the ordinary period of limitation for such personal relief.

[35] Mr Kilat referred me to *BB Mitra's Limitation Act*, by MR Mallick (19th Ed) where at p 666, the learned author said:

> Article 62 governs suits to enforce payment of money secured by mortgage or otherwise charged upon the immovable property. This Article is applicable to all suits for sale or foreclosure regarding mortgage as well as to suits to enforce charge within the meaning of s 100 of the Transfer of Property Act. The old article also covered both suits. The suits to recover the money out of the immovable property mortgaged or charged but not to suits to recover the money due from the defendant personally

[36] Having considered the arguments, I agree with both Mr Kilat and Mr Sandhu for the reason that the word 'enforce' is used in item 101. If the legislature had wanted a meaning as subscribed by Mr Chan, the word 'recover' would be more appropriate. The word 'enforce' was used, in my view, to specifically refer to an exercise of the rights of a first chargee.

[37] Mr Chan also submitted that the case of *Sutton v Sutton* 22 Ch D 511 which held that the limitation period for enforcing a charge under the Real Limitation Act 1874 is 12 years, should be followed by this court. With respect, the facts there are different in that there was a registered mortgage, while here we have an unregistered first charge and not an action to foreclose the sublots. In any event the commentaries on the Indian Limitation Act are more applicable as the words used in both legislations are identical.

[38] Accordingly I hold that item 101 of the Sarawak Limitation Ordinance does not apply to this case.

[39] I come now to the question which item of the Sarawak Limitation Ordinance applies in this case. Both Mr Kilat and Mr Sandhu submitted that the items are either item 1 which states:

> 1. Upon a Statute, Act, Regulation or By-law doe a penalty or forfeiture.
>
> … 1 years …
>
> When the penalty or forfeiture is incurred.

or item 97 which states as follow:

97. Suit for which no period of limitation is provided elsewhere in this schedule

… 6 years …

When the right to sue accrues.

[40] For reasons set out later in issue three, I do not find that the rates and fees can be regarded as penalty and as such, item 1 does not apply and I accordingly find that item 97 would be the applicable one.

Did the plaintiff comply with the statutory provisions in imposing the fees on unpaid rates? If so are the defendants liable to pay the imposed fees?

[41] Mr Kilat's contention here was that the plaintiff had not proved that the fees imposed were one which was proportionate to the added costs of monitoring the unpaid assessment. For this he relied on the High Court decision in the case of *Generation Product Sdn Bhd v Majlis Perbandaran Klang* [1997] MLJU 147. However when it was pointed out by Mr Chan that that decision had been overturned by the Court of Appeal in *Majlis Perbandaran Klang v Generation Product Sdn Bhd* [2006] 4 MLJ 635, he withdrew his contention. In overruling the decision of the High Court, the Court of Appeal through Mokhtar Sidin JCA at p 650, para 27, of the judgment said:

> The appellant, on the other hand, contended that s 147(1) gives the authority to fix the 'fee' as stated in that section, viz … the owner or owners shall be liable to pay the same together *with such fees as the local authority may fix from time to time*. The wordings clearly show that the appellant is the sole authority to fix the fee. The appellant could, if it wishes, fix the 'fee' on the actual costs or disbursements to recover the sum due or fix a standard rate for all ratepayers. In the present appeal, the appellant chose the latter in that the 'fee' is fixed at a percentage of unpaid amount and arrears. Section 147(1) gives such right to the appellant and we could not find any provision in the Act which restricts that right. In our view, the respondent could only challenge the fixed 'fee' if it could be shown that it is so unreasonable.
>
> (Emphasis added.)

After referring to some English cases, Mokhtar Sidin JCA said at p 654 para 31:

> The above decisions make it very clear that where a statute gives the power to an authority and the authority exercises that power, the *power could only be challenged by showing bad faith, mistake in construing the limits of the power, a procedural irregularity or unreasonableness*. In the present appeal, the appellant is empowered to fix the 'fee'. The respondent only raised the issue of actual costs or disbursements of correspondences and notices. In their submission before us and in the court below, we could not find anything to show that the fixed 'fee' was made in bad faith, mistake in construing the limits of the power or unreasonable. We find no merit in the contention of the respondent.
>
> (Emphasis added.)

[42] The wordings in s 73 of the KMO (s 74(1) of the LAO (Chapter 20) are the same and it states as:

> 73(1) If any sum payable in respect of any rate remains unpaid for a period of ninety days from the date upon which payment is due and payable, the owner or owners shall be liable to pay the same together *with such fee as the Commissioner may fix from time to time*.
>
> (Emphasis added.)

[43] Despite the above authority, both Mr Kilat and Mr Sandhu submitted that KMO requires the plaintiff to gazette the imposition of fees because that is what is required for the assessment of the rates and unless this had been done the fees are deemed to be invalid. However they were not able to point to any specific provisions similar to the assessment of rates in KMO requiring this. Without such specific provision, I reject their contention. In any event, fees on unpaid rates cannot be regarded as the same as rates.

[44] Further as required by the dictum in the Court of Appeal, the defendants in challenging the imposition of fees must prove to the court that the amount was an unreasonable one and was imposed in bad faith. No such proof is before me.

[45] Mr Sandhu also submitted that the fees imposed constitute a penalty in terrorem. With respect I am not quite sure what Mr Sandhu meant by his submission. Was he saying that the fees were unreasonable? If he was, then he has not tendered any proof to that effect. Hence I find that the submission is not sustainable.

[46] I come now to whether or not fees imposed were claimed for by the plaintiff. Even though the plaintiff may have decided to impose fees on unpaid rates, they still have to claim for it by notifying the defendants. One way of such notice is by way of endorsement on the assessment bills. In the present case the plaintiff had made such endorsement on some assessment bills, which reads as follows:

> default fee of 1% per month or part thereof will be levied on assessment rates settled after the last date of payment.

[47] It appears from the documents before this court that not all assessment bills contained such endorsement. In fact counsels had confirmed that only four assessment bills contained such endorsement and they were as follows:

Third defendant: RM644 for Lot 407 & RM653 for 408;

Fifth defendant: RM644 for Lot 411 & RM522 for Lot 412.

[48] Mr Chan however submitted that the final notices dated 10 March 1993 in exhs A and B are evidence that proper notices had been given. Further he relied on the certificates produced in exhs C and D and s 154(1) of the LAO to submit that the plaintiff has made out a prima facie case of liability for the unpaid fees. On this I agree with Mr Kilat that Mr Chan's submission presupposes that there were proper notices given to the defendants. As stated earlier there were only four assessment bills which contained the endorsement informing the owners of the fees for non payment of rates. It is my view that such proper notices must be given to the owners before the plaintiff can claim for the same.

Whether the claim against the second, third, fourth and fifth defendants, in their representative capacity, pursuant to the court order dated 27 April 2000, is competent as against the third, fourth and fifth defendants without the service by the plaintiff of the writ of summons on the second defendant?

[49] The answer to this issue lies in the order made by the court on 27 April 2000 (encl 55). There is no provision in the order that all the then intended defendants must be served. Neither were they made as joint representatives for the purchasers. Further I see no prejudice to the third, fourth and fifth defendants as the representative action affects the purchasers which they represent and as rightly pointed out by Mr Chan, any execution on any judgment obtained must be done with the leave of the court, at which time those purchasers I would presume must be notified. Accordingly I hold that Mr Sandhu's contention is without merit.

Whether, in law, the rates and fees levied for outstanding rates claimed against the third, fourth and fifth defendants in this action had been validly assessed and levied under the Kuching Municipal Ordinance (Cap 116) and/or the Local Authorities Ordinance 1996 (Cap 20)? Whether the third, fourth and fifth defendants are liable under the Kuching Municipal Ordinance (Cap 116) and/or the Local Authorities Ordinance 1996 (Cap 20) for the rates of the period from second half 1989 to second half 2003 under the Assessment Bills issued by the plaintiff in the sole name of the first defendant?

[50] It is an agreed fact that the assessment bills prior to 31 December 2003 were issued in the sole name of the first defendant and because of this Mr Sandhu submitted that the rates and fees were not validly assessed and levied as his clients were not properly informed. Firstly it should be noted that the first defendant through Mr Kilat had rightly conceded from the bar that the plaintiff had complied with the statutory provisions in assessing and levying the rates. Mr Sandhu's submission, with respect, may have some merit had the third, fourth and fifth defendants complied with their statutory duty provided for in s 76J–(1) which states as follows:

> Whenever any rateable property within the municipality is sold or transferred it shall be the duty of the seller or transferor and the purchaser or transferee within three months after such sale or transfer to give notice thereof to the Council in Form F of the Second Schedule.

[51] There is no dispute here that that duty had not been complied with by the defendants until 15 December 2003 when KP Complex Management Sdn Bhd wrote to the plaintiff enclosing all the sale and purchase agreements of the purchasers of various lots in Kuching Plaza.

[52] In any event, I am of the opinion that the duty lies with the first defendant to inform the purchasers whenever there is assessment and review of rates as long as the records of the plaintiff in respect of ownership of the sublots had not been changed.

Whether the plaintiff has, by conduct subsequent to the filing of this action, abandoned and/or waived their claim in this action on the rates and fees levied for outstanding rates as against the first, third, fourth and fifth defendants in both their personal and representative capacity, and/or whether the cause of action against them in this action has been extinguished by such conduct?

[53] With respect, I don't quite understand the contention put forth by both Mr Kilat and Mr Sandhu. What the plaintiff did was to send fresh notices to individual purchasers after their records had been updated by the KP Complex Management Sdn Bhd. Those notices included outstanding rates up to first half 2005. How that can amount to conduct of waiver of the claims made in this suit is baffling to me. Hence I find no merit in this contention.

[54] For reasons given above, I make the following orders:

(1) The first, third, fifth defendants and the purchasers which the third and fourth and fifth defendants represent shall be liable to pay the rates and fees levied for their own respective lots.

(2) In respect of the unpaid rates:

In respect of the first defendant, judgment to the plaintiff for the sum of RM321,348;

In respect of the third defendant, judgment to the plaintiff in the sum of RM14,706.55;

In respect of the fifth defendant, judgment to the plaintiff in the sum of RM13,221.10;

In respect of the other purchasers represented by the third, fourth and fifth defendants, judgment to the plaintiff in the sums as listed in encl 433 for each respective lots owned by the individual purchasers as listed in encl 433.

(3) In respect of the fees levied on unpaid rates:

In respect of the third defendant, judgment to the plaintiff in the sum of RM2,643.47.

In respect of the fifth defendant, judgment to the plaintiff in the sum of RM2,376.82

(4) Statutory interest of 8% per annum on the judgment sums from the date of this order till full payment of the judgment sums.

(5) Costs to the plaintiff to be taxed unless agreed.

(6) The counterclaims of the first defendant are struck out with no order as to costs.

Order accordingly.

Reported by Peter Ling